(10)

No. 87-65

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

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December 23, 1987

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55 pp

QUESTIONS PRESENTED

1. May a newspaper publisher and its editor, who are accused of criminal contempt of court for violating a prior restraint on publication entered by a federal district court by publishing an article based on information lawfully obtained by the publisher from the FBI under the Freedom of Information Act, defend themselves in the contempt proceeding on the ground that the prior restraint was unconstitutional and transparently invalid?

2. Did a federal district court have subject matter jurisdiction to enter a prior restraint on publication of information lawfully obtained by a newspaper from the FBI under the Freedom of Information Act?

3. May a federal district court within the First Circuit, consistent with the due process clause of the Fifth Amendment, hold a newspaper publisher and its editor in contempt of court for testing the constitutionality of a prior restraint on publication in precisely the way the Court of Appeals for the First Circuit had previously concluded such orders may be tested?

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UNITED STATES OF AMERICA,

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PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On November 8, 1985, Raymond J. Patriarca ("Patriarca") commenced an action against the Federal Bureau of Investigation, its director William H. Webster, the Department of Justice, Attorney General Edwin Meese and against the Providence Journal Company ("the *Journal*")[1] and WJAR TELE-

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1 A statement pursuant to Rule 28.1 of the Rules of this Court regarding parent companies, subsidiaries and affiliates of the Providence Journal Company appears as footnote 1 to the Respondents' Brief in Opposition to the Petition for a Writ of *Certiorari*, previously filed with this Court. Since that brief was filed, Icchi Communications Corporation has ceased to be an affiliate of the Providence Journal Company; Michiana Telephone Company and Savannah Cellular Telephone Company have since become affiliates of the Providence Journal Company.

VISION TEN ("WJAR"). (JA 72, 206)[2] The action related to "the defendant's dissemination of logs and airtels compiled [by the FBI] during the course of an illegal electronic surveillance during the years 1962 to 1965" of Patriarca's deceased father, Raymond L.S. Patriarca.[3] (Complaint, ¶ 8; JA 207-08)

According to the Complaint, the action was brought under the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. III 1985), with subject matter jurisdiction bottomed on that Act and on Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* (1982 & Supp. III 1985). (Complaint, ¶¶ 8, 9; JA 207-08) The Complaint makes no assertion of jurisdiction under the Fourth Amendment or any other constitutional provision. (JA 207-08)

The governmental defendants, the Complaint asserted, had wrongfully authorized the release of the illegally obtained data to both the *Journal* and to WJAR "pursuant to [a] request made by them under the Freedom of Information Act." (Complaint, ¶ 17; JA 209) WJAR, the Complaint alleged, already had "disseminated portions of logs furnished" to it to the public. (*Id.* at ¶ 18; JA 209) The *Journal*, the Complaint alleged on information and belief, was "in the process of

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2 References to "JA _____" are to appropriate pages of the Joint Appendix in this case. References to "PA _____" are to appropriate pages of the Appendix to the Petition for a Writ of *Certiorari*.

3 Raymond L.S. Patriarca has long been identified as what the Solicitor General's brief characterizes as "a senior member of a New England organized crime 'family.' " (S.G. Br. 3) A 1965 report by the Committee on Government Operations of the United States Senate labeled the elder Patriarca as the "Mafia boss" of Providence, R.I., and Boston, Mass., and set forth the infrastructure of his "crime family." S. Rep. No. 72, 89th Cong., 1st Sess. 43-45 (1965). As recently as 1985, it was the position of the United States that the elder Patriarca, until his death in 1984, was the "Boss" of "the Patriarca Family of La Cosa Nostra which operated in the District of Massachusetts, Rhode Island and elsewhere." *United States* v. *Angiulo*, Indictment No. 83-00235 (D. Mass.). After the death of the elder Patriarca, his son was described by the Attorney General of Rhode Island as the "new head of organized crime in New England." *Providence Journal-Bulletin*, Nov. 17, 1984, p. A-1.

preparing for the dissemination" of the information "in its newspapers." (*Id.* at ¶ 19; JA 209)

At the same time the Complaint was filed, Patriarca filed a Motion for Temporary Injunction and/or Injunctive Relief seeking, *inter alia*, an order "enjoining the named defendants from disseminating or publishing logs and airtels compiled as a result of the electronic surveillance" conducted between March of 1962 and July of 1965. (JA 217-18) The motion was supported by a four-paragraph affidavit of counsel to Patriarca which asserted that "the dissemination and publication of the logs and airtels would cause irreparable harm, damage and injury" to Patriarca (JA 219-20) and a two-page memorandum which referred to the Fourth Amendment to the Constitution and to various sections of the Freedom of Information Act. (Plaintiff's Memorandum at 2)[4]

The *Journal* was served with the Patriarca Complaint, motion and other accompanying papers on Tuesday, November 12, 1985. (Abrams Letter at 1; PA 29) The following day, November 13, 1985, the District Court, per Francis J. Boyle, Chief Judge, held a chambers conference at 12:30 p.m. on Patriarca's motion. (JA 33, 176) At the conference of about

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4 For the convenience of the Court, Respondents have lodged with the Clerk of the Court four documents that were before the Court of Appeals for the First Circuit when this appeal was heard by that court, but are not part of the Record here for technical reasons. Two of these documents, although included in the Appendix before the First Circuit, were never formally docketed by the District Court. These are: (1) Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and/or Injunctive Relief ("Plaintiff's Memorandum"); and (2) Federal Defendants' Objection to Plaintiff's Motion For Injunctive Relief ("Federal Defendants' Objection"). The third document is a letter from Floyd Abrams, Esq., to Mr. Francis P. Scigliano, Clerk of the First Circuit, dated September 12, 1986, answering a question raised by Judge Coffin during oral argument of this appeal in that court ("Abrams Letter"). The fourth document is the brief, *amicus curiae*, filed on behalf of the United States in the First Circuit, in which the Justice Department took the position that the District Court lacked jurisdiction under Title III to enter its order restraining the *Journal* from publishing its article about Patriarca ("Federal Defendants' *Amicus* Brief").

one-half hour (at which no transcript was made) the District Court briefly heard counsel. (JA 41) Counsel for the *Journal* opposed the issuance of any restraint on publication on the ground that any such order would constitute a prior restraint forbidden by the First Amendment. (JA 170-71) The United States, as well, opposed the granting of the temporary restraining order (JA 171-72). As Judge Boyle recalled the conference, it was specifically argued to him that under the Freedom of Information Act the court had "no jurisdiction to do anything." (JA 184) Nonetheless, despite the fact that Patriarca's Complaint had not even cited the Fourth Amendment as a basis for any claim against the *Journal* (JA 207-08, 183-84), the court was convinced that what it understood to be the emerging clash between the Fourth Amendment and the First Amendment (JA 182) was presented in the case.[5] As Judge Boyle recalled it, after being advised that there was no jurisdiction for the claim under the Freedom of Information Act, he responded by saying that "it didn't seem to me that the Freedom of Information Act had changed the Constitution or the Fourth Amendment." (JA 184) Convinced that Fourth Amendment principles had to be weighed against ones rooted in the First Amendment, over the objections of counsel to the *Journal* and the government (and tc the "surprise" even of counsel to Patriarca (JA 172)), the court entered a temporary restraining order barring publication of the logs and airtels by the named defendants, including the *Journal*. (JA 37-38) Judge Boyle was prepared to hear argument on the motion for a preliminary injunction the next morning, November 14. After counsel to Patriarca advised the court that he had another

5 Judge Boyle noted that he had recently attended a lecture at the Judicial Conference for the First Circuit in which a case was discussed involving an individual who had saved President Ford's life, who was identified in a newspaper article as being homosexual and who then sued the newspaper on privacy grounds. (JA 184) The case referred to by Judge Boyle neither involved an application for a prior restraint nor a claim bottomed upon the Fourth Amendment. The claim, based on common law privacy principles, was dismissed by the California courts. *See Sipple* v. *Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

matter scheduled on that day before a different judge, a matter he stated he would contact the judge "to work . . . out" and that he believed he "probably could straighten out," counsel to the *Journal* requested that the case be heard later than the morning of November 14 so that he could better prepare for the argument. (JA 167, 168) The District Court, in the words of Patriarca's counsel, "was accommodating everyone" (JA 167) and scheduled the hearing on plaintiff's motion for 10:00 a.m. on Friday, November 15, 1985.

Around dinner time on November 13, Charles M. Hauser, the executive editor of the *Journal*, was first advised of the court order. (JA 121) He had discussions with other executives on the newspaper who had learned of the court order that afternoon. A variety of considerations were discussed including the risks of non-compliance with the order ("[w]e were extremely concerned with the fact that our decision involved disobeying an order of the Federal Court" (JA 122)); the nature of the order ("[t]here was no question in our minds that it was a Prior Restraint" (JA 123)); the dangers of compliance with the order ("[w]e considered that failing to publish in the next edition of 'The *Journal*' would be a clear signal to people that frequently like to block publication of something . . . [that] they could use the courts to block publication" (JA 124)); and alternatives to publishing ("of course, the question of appealing from the ruling came up . . . but our understanding was that there was no practical way to appeal that night from a temporary restraining order" (JA 125)).[6] Mr. Hauser knew, as well, that some of the material about Patriarca furnished by the FBI had previously been broadcast by a television station and published by another newspaper, *The Hartford Courant*. (JA 141)

6 On cross-examination of Mr. Hauser in the contempt hearing, he stated that his deputy executive editor James V. Wyman, who was the "regular liaison with the attorneys," had told him that "[i]t was not practical or it was futile to attempt to appeal a Temporary Restraining Order." (JA 149)

After weighing what he understood to be the *Journal*'s options, Mr. Hauser decided to proceed with an article based on information provided by the FBI to the *Journal* under the Freedom of Information Act. (JA 140) On November 14, 1985, the *Journal* published one article concerning Patriarca and his father and another about Judge Boyle's order. (JA 18, 39, 49)

The District Court conducted a hearing on Friday, November 15, 1985, on the topic of whether the restraining order should remain in effect. (JA 66) The court continued the restraining order and set the following Tuesday, November 19, 1985, for a hearing on the preliminary injunction sought by Patriarca. (JA 64) In Judge Boyle's view, as expressed in his ruling declining to lift the restraint, although "the rule is well established that there shall be no prior restraint of a free exercise of the press rights conferred by the First Amendment" (JA 60) there was "something to the argument that an injunction at this point is not a prior restraint . . . ." (JA 62) At the close of the hearing on November 15, counsel for the *Journal* requested the court to enter a preliminary injunction rather than to continue in effect the temporary restraining order so as to enable the *Journal* to take an immediate appeal. (JA 65) Judge Boyle responded that he understood that "if you have a restraining order you have some difficulties with an appeal," but declined to alter his order. (*Id.*) On November 19, 1985, the court conducted a further hearing and then entered an order vacating its temporary restraining order, denying preliminary injunctive relief against the *Journal* and the other media defendants, and granting a preliminary injunction against further dissemination by the FBI or the United States Department of Justice of logs or airtels generated by the 1962-65 electronic surveillance. (JA 85)

Patriarca's counsel filed a motion to adjudge the *Journal* in contempt on November 14, 1985. (JA 223-25) When he declined to prosecute the *Journal*, the District Court, without seeking to have the Department of Justice undertake the prosecution, invoked Fed. R. Crim. P. 42(b) and appointed a

special prosecutor, William A. Curran, Esq., to do so. (JA 237-38)[7] The court ordered the *Journal* and Hauser to show cause why they should not be adjudged in criminal contempt, and scheduled a hearing for February 10, 1986. The *Journal* and Hauser waived their right to jury trial. (JA 202) Following a hearing, at which the special prosecutor and the defendants stipulated to an agreed statement of facts which was made part of the record (JA 33-113), the District Court adjudged the defendants guilty of criminal contempt. (JA 239-40)

The opinion of Judge Boyle relied heavily on the fact that the *Journal* had, in 1976, sought and been refused by the FBI access to the same information it had sought again in 1985 after Patriarca's death. Since the former decision of the FBI had been affirmed by the Court of Appeals for the First Circuit, Judge Boyle concluded, the *Journal* remained "bound" by it despite its renewed application and the FBI's changed decision to provide the materials. *Providence Journal Co.* v. *FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

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7 The Solicitor General takes the position in his brief that the District Court's stated reasons for doing so—the fact that the FBI and the Department of Justice were defendants in the action commenced by Patriarca—were "insufficient." (S.G. Br. 1) From the time of the appointment of the special counsel to this date, the case has been prosecuted by the special counsel. The decision to seek *certiorari* was made by the special counsel and the appeal to this Court has been conducted by and argument noticed on behalf of the United States by the special counsel. This procedure is in direct conflict with 28 U.S.C § 518(a) (1982), which requires that the "conduct and argu[ment]" of all cases in this Court "in which the United States is interested" shall be by the Attorney General, the Solicitor General or their designee. A separate motion has consequently been made on behalf of respondents to dismiss the writ of *certiorari* on the ground that the petition for a writ of *certiorari* was not properly filed on behalf of the United States and that the United States may not lawfully be represented in this Court by anyone not authorized to do so by the Attorney General or the Solicitor General. Respondents' Motion To Dismiss The Writ Of *Certiorari*, filed December 16, 1987.

As for the specific issues raised in the contempt case, Judge Boyle first concluded that "significant legal issues" had been raised (PA 11) and that subject matter jurisdiction was present. The court then rejected the stipulation of the parties (JA 34-35) that the *Journal* had received the information lawfully (PA 14) and turned to what it believed to be the critical Fourth Amendment issue. Reasoning that "it does not do violence to the constitutional scheme if a free press were required to respect Fourth Amendment personal security" (PA 16), the court concluded that "the clash between the First and Fourth Amendments" required "at least a brief time to consider the merits of this action." (PA 17)

Rejecting the contention of the *Journal* that the collateral bar rule should not be held to apply where a judicial order bars "pure" speech (as opposed to speech mixed with conduct as was at issue in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967)), Judge Boyle concluded that there was no relevant distinction between the legal impact of injunctions which barred conduct such as marches and strikes and those which barred speech alone. (PA 19-20) The *Journal*, Judge Boyle finally concluded, had "seized the judicial power to itself," decided its own case by violating his order, and was in contempt. (PA 22)

On April 2, 1986, following a further hearing on sentencing, the court imposed an 18-month jail sentence on Hauser, suspended the sentence, ordered Hauser to perform 200 hours of public service and fined the *Journal* $100,000. (JA 194-97)

The Court of Appeals reversed the contempt convictions. The initial opinion of the court, written for a unanimous panel by Judge Wisdom, concluded that the temporary restraining order entered by Judge Boyle was a transparently invalid prior restraint on pure speech which had been properly tested by the *Journal* by violating it.

The Court of Appeals opinion identified two distinct interests it believed should be reconciled. One was the interest reflected in the First Amendment antipathy to prior restraints,

what the court characterized as "the most significant" of all the constitutional imperatives protecting a free press. (PA 30) The other, equally well established, was the "requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt." (PA 32)

The court pointed out that although the latter principle, the collateral bar rule, was a principle of general applicability, this Court had held that orders entered by courts without personal or subject matter jurisdiction were not subject to the rule and that orders referred to in *Walker* v. *City of Birmingham* as "transparently invalid" were not either. (PA 34) Distinguishing between "transparently invalid" orders and ones that are merely invalid, the court acknowledged, was not easy and could generally be accomplished only by assuming that if an order had any pretense to validity at the time it was issued, it must be obeyed. However, the court held, some orders, such as that at issue here, are so patently unconstitutional that they should be excepted from the collateral bar rule. Orders barring pure speech, the court concluded, are distinguishable from those—as in *Walker* v. *City of Birmingham*—involving conduct or conduct and speech. (PA 45)

Turning to each of the three grounds adverted to by Patriarca for the injunctive relief sought against the *Journal*, the court rejected each as even a conceivable basis for a prior restraint. The First Circuit's own ruling in the *Journal*'s earlier effort in the 1970s to obtain access to the Patriarca material was, the court concluded, simply a recognition that the FBI had discretion not to release the material (PA 38); the FOIA was rejected as even a possible source of power for an injunction (*id.*); Title III was held to provide no basis for a prior restraint (PA 39); and the Fourth Amendment, so emphasized by Judge Boyle, was held to apply only to government action, not that of the press (*id.*). Finally, the court concluded that although the *Journal* arguably could have appealed to the Court of Appeals or sought a writ of *mandamus* (which the court described as "difficult to obtain" (PA 44 n.70)) that

course of conduct should not be required in the case of an order so transparently invalid. (PA 44)

It was the last of these conclusions only that the court reconsidered when the special prosecutor filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The court granted the suggestion for rehearing *en banc* and issued its own *en banc* opinion as an addendum to, and modification of the panel opinion, which, as modified, it adopted. (PA 47)

In the *en banc* opinion, the court held that henceforth a publisher subject to a temporary restraining order which the publisher considers to be transparently unconstitutional should nonetheless make a good faith effort to seek emergency relief from the appellate court. (PA 48) As to the instant case, however, the *en banc* court stated that it lacked "a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" and that it would be unfair to impose such substantial sanctions upon the publisher for its failure to have followed the procedure just announced. (PA 49)

SUMMARY OF ARGUMENT

At the heart of this appeal, as considered in Section I of this brief, is the question of whether two nearly absolute rules of transcendent importance to principles of freedom and order can be reconciled. One is a proposition that is as nearly absolute as any that arises from the Bill of Rights: prior restraints barring the publication of news are inconsistent with the First Amendment. The rule has been phrased in various ways, sometimes in terms of the "presumptive unconstitutionality" of prior restraints,[8] more recently by referring to prior

8 *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (*per curiam*) ("*Pentagon Papers Case*"); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

restraints on publication as "the most serious and least tolerable infringement on First Amendment rights."[9]

At the same time, there can be no effort to minimize the general desirability of what has come to be known as the collateral bar rule. The proposition articulated by this Court in *Walker* v. *City of Birmingham* that "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom," 388 U.S. at 321, remains as true today as when written. So does the proposition that there are particular characteristics of the judiciary, unlike other branches of government, which generally require obedience to court orders, even if they are incorrect.

In this case, the question is whether these propositions can be reconciled. The briefs of both the petitioner and the Solicitor General[10] see no need for accommodations at all; both urge that the obligation to obey judicial orders is such that in no situation should the invalidity of the order constitute a defense in a later contempt action. This brief rejects that absolutism, urging that although federal court orders must generally—and, indeed, nearly always—be obeyed until reversed, there are already well-recognized exceptions to that rule and that the collateral bar rule should not be deemed applicable in cases involving alleged violations of presumptively unconstitutional court orders barring pure speech. That conclusion is, as we demonstrate, consistent with virtually every court ruling re-

9 *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). *See also Lowe* v. *Securities and Exchange Comm'n*, 472 U.S. 181, 224 (1985) (a "prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances") (White, J., concurring, joined by Rehnquist, J., and Burger, C.J.).

10 To avoid confusion between reference to the brief of the United States as Petitioner (written by the special prosecutor) and that of the "United States as *Amicus Curiae* Supporting Petitioner" (written by the Solicitor General), we refer to the former as "Petitioner's Brief" or "Pet. Br. _____" and the latter as the "Solicitor General's Brief" or "S.G. Br. _____."

garding prior restraints on pure speech since *Walker* v. *City of Birmingham*.

In Section II of this brief we demonstrate, as an alternative ground for a ruling in favor of the *Journal* and its executive editor, the absence of subject matter jurisdiction in the District Court. All agree that, pursuant to 18 U.S.C. § 401(3) (1982), courts may punish only "[d]isobedience or resistance" to a "lawful" order of the court. Since an order entered without jurisdiction cannot be deemed lawful, we urge in this section that the court's lack of subject matter jurisdiction is fatal to the contempt conviction.

Finally, in Section III of the brief, we urge that the imposition in this case of criminal sanctions on the *Journal* and its executive editor would violate due process of law as guaranteed by the Fifth Amendment. Given the fact that the Court of Appeals for the First Circuit had itself concluded only five years before the instant case that an order banning publication of pure speech could be tested "by violating it and contesting the resulting contempt sanction," *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), we urge that criminal punishment of the defendants cannot be squared with the Fifth Amendment.

ARGUMENT

I.

THE ENTRY BY THE DISTRICT COURT OF A PRIOR RESTRAINT PROHIBITING PUBLICATION BY A NEWSPAPER OF LAWFULLY OBTAINED INFORMATION WAS PATENTLY UNCONSTITUTIONAL AND INVALID AND THE COLLATERAL BAR RULE SHOULD NOT BE HELD TO PRECLUDE DEFENDING AGAINST A FINDING OF CRIMINAL CONTEMPT

The submissions of both the petitioner and the Solicitor General offer a single refrain: this case involves the vindication of one and only one interest; that interest is the principle that federal court orders must be obeyed; since the *Journal* did not obey Judge Boyle's temporary restraining order, so the argument goes, the collateral bar rule enunciated in a torrent of cases culminating in *Walker* v. *City of Birmingham*—a case, the Solicitor General claims, that arose in "essentially identical circumstances" (S.G. Br. 30)—requires the conclusion that the finding of contempt against the *Journal* and its editor be reinstated. This reasoning is clear enough, but it simply ignores all competing considerations: the existence and weight of one of the most deeply rooted of all constitutional principles, the nearly absolute First Amendment bar on prior restraints on speech; the fact that the collateral bar rule itself has long been held to be subject to significant, if narrow, exceptions; the fact that in *Walker* itself restraints on pure speech, such as are involved here, were distinguished from restraints on conduct; and the ease with which general adherence to the collateral bar rule could accommodate an exception in cases involving prior restraints on pure speech as distinguished from speech and conduct.

A. The Order Of Judge Boyle Was An Unconstitutional Prior Restraint On Expression

We start with what should be undisputed: the temporary restraining order entered by Judge Boyle on November 13,

1985, barring publication by the *Journal* of information lawfully obtained by it from the FBI constitutes a prior restraint on freedom of expression. That the restraint was intended to be brief does not change its character. "A prior restraint," this Court has emphasized, "has an immediate and irreversible sanction" such that "the temporary nature of a restraint" does not reduce the heavy burden imposed on the government to justify it. *Nebraska Press Ass'n* v. *Stuart*, *supra*, 427 U.S. at 559. In the same term that the Court decided *Nebraska Press Ass'n*, a plurality of this Court phrased the same point in a different way: "[t]he loss of First Amendment freedoms, for even minimal periods of time," the Court said, "unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).[11]

That this Court should have viewed even the briefest of prior restraints as raising the most profound dangers to a free society reflects the extraordinary level of distrust continually exhibited

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11 Justice Brennan's concurring opinion in the *Pentagon Papers Case* contains similar conclusions:

> "I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. . . .
>
> "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue." (403 U.S. at 724-27)

See also Nebraska Press Ass'n v. *Stuart*, *supra*, 427 U.S. at 572 (Brennan, J., concurring).

in decisions of this Court about any and all prior restraints on free expression. In fact, so consistent are the authorities to the effect that the "chief purpose of the [First Amendment] guaranty [is] to prevent previous restraint upon publication," *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), and that "prior restraints on speech and publications are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, *supra*, 427 U.S. at 559, that legal debate has tended to relate to how the nearly total ban on prior restraints should be articulated rather than whether the ban exists. In a number of opinions prior and subsequent to *Near* v. *Minnesota*, the ban on prior restraints on publication was expressed as an absolute. *See*, *e.g.*, *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249 (1936); *Kunz* v. *New York*, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting). In *dictum* in *Near*, a possible narrow exception in certain national security cases was adverted to; in the *Pentagon Papers Case*, the same extraordinary narrow exception was discussed; in *Nebraska Press Ass'n*, the possibility that Sixth Amendment considerations could lead in some future case to a valid prior restraint was considered.[12] In no

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12 In both the *Pentagon Papers Case* and the *Nebraska Press Ass'n* cases, this Court, while eschewing absolutist rejection of all prior restraints, established tests so difficult to meet that they may fairly be described as near absolute in character. In the *Pentagon Papers Case*, the critical concurring opinion of Justices Stewart and White concluded that absent proof that publication would "surely result in direct, immediate, and irreparable damage to our Nation or its people," no restraint could issue. (403 U.S. at 730) In *Nebraska Press Ass'n*, the Court established tests so demanding that it should come as no surprise that as of October, 1987, it could be assessed that the Court had "set barriers so high that it is doubtful that a prior restraint on coverage of a trial will ever be upheld," Abrams, *Prior Restraints*, 3 *Communications Law 1987* 7, 15 (PLI 1987). It is noteworthy that five members of this Court in *Nebraska Press Ass'n* concluded that prior restraints on publication of any lawfully obtained information about pending trials would likely be unconstitutional. *See* 427 U.S. at 572, 595 (Brennan, J., concurring, joined by Stewart, J. and Marshall, J.) (no "new exception to the rule against prior censorship of publication" should be established); *id.*

press case involving what would otherwise be protected speech under the First Amendment has any prior restraint on speech been affirmed by this Court. In no press case decided by this Court has any exception to the ban on prior restraints on news reporting other than in the national security or Sixth Amendment areas even been considered conceivable.[13] In short, Justice White's conclusion that First Amendment law had created a "virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content," remains as acute today as when written.[14]

To say this is not to quarrel with the proposition that all prior restraints are "not unconstitutional *per se*," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975). But that does not mean, as the District Court apparently believed, that there is to be continuing *ad hoc* judicial balancing as to whether particular prior restraints are or are not to be entered. As this Court made clear in *Southeastern Promotions*, "[i]n

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at 570 (White, J., concurring) (expressing "grave doubt" that any prior restraint in this area would "ever be justifiable"); *id.* at 617 (Stevens, J., concurring) ("if ever required to face the issue squarely, [I] may well accept [the] ultimate conclusion" of Justice Brennan's concurrence).

13 One of the rationales the Court articulated for its decision denying a prior restraint in *Nebraska Press Ass'n* was that there was no way of determining that the prior restraint would effectively accomplish what was intended. (427 U.S. at 563) Here, similarly, since other media (including non-parties to the litigation) had the same information which the Government had disclosed to the *Journal*, there could have been no possible finding that the prior restraint would even accomplish its intended purpose. In fact, the Complaint itself alleged that WJAR had *already* "disseminated portions of logs furnished to them." (Complaint, ¶ 18; JA 209) And the parties to the contempt action stipulated that "[t]he material which was the subject matter of the publication by the *Journal* on November 14, 1985, was in the possession of, and had been, or was about to be, published by other media." (JA 35)

14 *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 249 (1974) (White, J., concurring).

order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559) No such previously recognized exception has even been advanced in this action.

Cases involving prior restraints sought to be imposed upon the press involve what this Court has often referred to as "pure speech"—*e.g.*, speech not mixed with conduct. In stark contrast is the expression involved in cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967),[15] in which this Court upheld a finding of criminal contempt in connection with disobedience of a court order restraining public demonstrations on city streets. In that case the Court went out of its way to distinguish "pure speech" from speech mixed with conduct. Justice Stewart, writing for the majority in *Walker*, quoted with approval the following passage from *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965):

> " 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' " (388 U.S. at 316)

As *Walker* v. *City of Birmingham* demonstrates, the Court has distinguished the special treatment accorded pure speech such as was voiced by the *Journal* from that given other forms of speech and publication which are entitled to lesser degrees of protection. In analyzing prior restraints of activities other than pure speech, such as the use of public facilities (*Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 561-62), the licensing of motion pictures (*Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965)), or participation in demonstrations or other similar activities involving conduct mixed with speech

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15 The decision in *Walker* v. *City of Birmingham* is discussed more fully in Section I.B., *infra*.

(*Cox* v. *Louisiana*, *supra*, 379 U.S. at 555), the Court has approved some restraints which give a reviewing court an opportunity to analyze the challenged activity. Even restraints involving these less-protected areas of speech cannot pass constitutional muster unless they can be "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 559.

Here, however, there is not the slightest suggestion in the briefs of either the petitioner or the Solicitor General that the prior restraint imposed by Judge Boyle could at any time meet any prior restraint test.[16] The order was entered as if a temporary restraining order on pure speech were no different from nor more serious than the most routine of orders maintaining the *status quo*—and as if a bar on previously protected speech could be said simply to maintain the *status quo* when, in fact, by its very issuance it totally eliminated the freedom to decide whether to speak at all. The opinion of the Court of Appeals did not overstate the fallacy of Judge Boyle's view by concluding that:

> "It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion." (PA 42)

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16 Nor could it. At no time did Patriarca make even the most modest evidentiary showing other than his claim that the material at issue had been illegally obtained by the FBI. There were, to say the least, no allegations of perils even remotely similar to the dangers of great magnitude and public consequence identified by this Court as necessary to support a prior restraint. (JA 206-11) It is nowhere alleged—it could not be alleged—that *any* communication which was the subject of the electronic surveillance contained the type of information which could possibly meet the tests set forth in the *Pentagon Papers Case* or *Nebraska Press Ass'n*.

B. Disobedience Of The Unconstitutional Temporary Restraining Order Cannot Subject The Respondents To Criminal Contempt

Since the plaintiff's claims clearly were insufficient to justify any prior restraint upon publication, the restraining order issued by the District Court unconstitutionally violated the *Journal*'s right to publish freely. Nonetheless, the petitioner and the Solicitor General both argue that the failure of the *Journal* to obey Judge Boyle's unconstitutional order, in and of itself, should deprive the *Journal* of the opportunity to defend the contempt case on the basis of the underlying unconstitutionality of the order. The First Circuit held, to the contrary, that where, as here, there is an unconstitutional prior restraint of pure speech which does not even arguably fall into one of the recognized exceptions to the ban on prior restraints and the restraint is subsequently vacated, disobedience of the invalid restraining order should not subject the violator to criminal contempt. (PA 45)

The issue posed is plainly more difficult than that considered previously in this brief. Under most circumstances, there is no question but that federal court orders—however wrongly decided they may be—must be obeyed and that the price of disobedience is the certainty of a contempt conviction. But that rule, significant though it is, is not and has never been thought to be absolute.

In *Walker* v. *City of Birmingham* itself—the case referred to by the Solicitor General as arising in "essentially identical circumstances" (S.G. Br. 30)—this Court indicated the vast difference between that case and this. In *Walker*, which held that the invalidity of an order enjoining petitioners from participating in mass street parades and the like did not serve as a basis for disregarding the order, Justice Stewart's majority opinion took care to distinguish speech mixed with conduct from pure speech. In upholding contempt convictions for violation of a court order that barred street demonstrations, the Court expressed its concern with disobedience of court

orders intended to prevent public disorder and violence. As we noted earlier, the Court explicitly rejected the " 'notion' " that the First and Fourteenth Amendments afforded " 'the same kind of freedom' " to those who engage in conduct such as marching and those who " 'communicate ideas by pure speech.' " (388 U.S. at 316) The Court relied upon its prior ruling in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), a case involving picketing near a courthouse in which the Court had observed that "[w]e are not concerned here with such a pure form of expression as a newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct." (379 U.S. at 564) And the Court emphasized again and again in *Walker* that it was dealing with conduct and the risks of conduct, not speech alone.

> "When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. . . . [A]s a unanimous Court stated in *Cox* v. *New Hampshire* [312 U.S. 569 (1941)]:
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> > " 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.' " (388 U.S. at 316)

Walker, as well, emphasized that the order entered by the Alabama court was not "transparantly invalid or had only a frivolous pretense to validity." (*Id.* at 315)

Both *Walker* and *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), involved a mixture of conduct and expression as opposed to the pure speech at issue here.[17] The restraining orders in both *Walker* and *United Mine Workers* restrained overt acts which allegedly would have caused public disruption. The restraining order here prohibiting pure speech involved nothing of the sort. On the basis of that distinction, the holdings in cases mandating compliance with later invalidated orders are not at all inconsistent with a rule permitting the subjects of transparently invalid prior restraints of pure speech to defend on the merits when they are accused of criminal contempt. *See Thomas* v. *Collins*, 323 U.S. 516 (1945) (where a Texas registration statute, as applied, prohibited pure speech soliciting union membership, it was unconstitutional and the judgment of contempt was reversed).[18]

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17 In *United Mine Workers*, the Court was concerned that a nationwide coal strike could take place while the courts were attempting to prevent enormous disruption and potential violence. (330 U.S. at 266-67) The lower court issued a temporary restraining order barring the defendants from encouraging mine workers to interfere with the operation of the mines. The defendants violated the temporary restraining order and were convicted of criminal contempt. This Court upheld the contempt convictions. *See* Section II, *infra*.

18 This Court's 1963 *per curiam* decision in *Johnson* v. *Virginia*, 373 U.S. 61 (1963), is also noteworthy. In that case, petitioner Johnson had been convicted of contempt by the Traffic Court of the City of Richmond, Virginia, as a result of his refusal to obey the judge's order that he move from the "section reserved for whites" to the "section reserved for negroes." (*Id.* at 61-62) This Court unanimously held that the contempt conviction could not stand, observing that "a State may not constitutionally require segregation of public facilities." (*Id.* at 62) The Court noted that the petitioner had not behaved "in a boisterous or abusive manner," *id.*, and it did not even allude to any obligation on the part of petitioner to obey an order which is characterized as "a manifest violation of the State's duty to deny no one the equal protection of its laws." (*Id.*) One can easily infer from the *Johnson* case the rule that there is a small class of judicial orders which need not be obeyed, even provisionally, because they are manifestly unconstitutional and indeed subversive of basic constitutional values.

It is true that a broad reading of *Walker* could suggest that all jurisdictionally proper orders,[19] even if invalid, must be obeyed. That is the position urged by both the petitioner and the Solicitor General. But that reading ignores all the distinctions so carefully set forth in *Walker* between limits on pure speech and limits on conduct; it ignores the Court's explicit recognition that "transparently invalid" orders differ from others; it is, at its core, a reading so absolutist that it is one that this Court has *never* provided. Several years after *Walker*, for example, this Court reaffirmed the rule of *Cobbledick* v. *United States*, 309 U.S. 323 (1940), holding that when a motion to quash a subpoena is denied, the movant may either obey its commands or refuse and, if cited for contempt, properly contest its validity in the contempt proceeding. *United States* v. *Ryan*, 402 U.S. 530 (1971). Again, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), after a motion to quash a subpoena was denied and the defendant refused to testify, the defendant was permitted to raise his First Amendment defense in the contempt proceeding.

Similarly, in a case involving the Fifth Amendment privilege, *Maness* v. *Meyers*, 419 U.S. 449 (1975), an attorney challenged a contempt penalty imposed upon him after he advised a client that he could assert the privilege during trial and refuse to produce subpoenaed material. Although this Court noted the basic proposition that "all orders and judgments of courts must be complied with promptly," *id.* at 458, it pointed out that compliance prior to appeal in this case could cause an irreparable injury that subsequent appellate vindication could not repair. The Court therefore held that the *Ryan* procedure—noncompliance with a review of the privilege at the contempt hearing—would be proper in Fifth Amendment cases. The Court found that such a procedure would be particularly appropriate in such cases given the Fifth Amendment's "ancient roots" and "the place this privilege occupies in the

19 *See* Section II, *infra*.

Constitution and in our adversary system of justice." (*Id.* at 461)

In each of these cases, it could have been held that the protection of the dignity and authority of the judicial system required obedience to the court orders. In fact, if the judicial system were as fragile as both the petitioner and the Solicitor General maintain, it should come as something of a surprise that parties were permitted to mount constitutional challenges in contempt proceedings involving any court orders that they had not obeyed.[20] Yet, in all these cases, the Court accommodated the need for—and the general need for rigor of—the collateral bar rule in situations in which parties would lose the very right they were seeking to vindicate by complying with the order in question.

Here, as in *Maness*, a doctrine with "ancient roots"—our society's abhorrence of prior restraints—would be imperiled by requiring in all circumstances obedience to unconstitutional court orders and by punishing any disobedience, however well-founded. As phrased by one Court of Appeals:

> "If the collateral bar rule applies to an order restraining expression, the would-be speaker faces a Hobson's choice: either violate the order, risking almost certain conviction for contempt, and lose the right to challenge the order's constitutionality, or alternatively, obey the order, seek review, and forfeit, at least temporarily, the very right the would-be speaker seeks to vindicate. The dilemma is particularly acute where First Amendment interests are at stake, for even a temporary restraint on expression may constitute irreparable injury. *Nebraska*

20 As phrased by one scholar, "if the rationale of the collateral bar rule is that one should not be encouraged to act as a judge in his own case, recognition of *any* exception directly undermines that principle by encouraging defendants to decide for themselves whether a judicial order is frivolous." Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 95 (1984) (emphasis in original). Professor Redish concludes that "the collateral bar rule can never be justified in the enforcement of a preliminary injunction." *Id.* at 99.

Press Ass'n, 427 U.S. at 559, 96 S. Ct. 2791, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182, 89 S. Ct. 347 (1968)." (*In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979))

The Court of Appeals for the Ninth Circuit, as well, has expressed concern about the possible impact of the application of the collateral bar rule in cases in which unconstitutional prior restraints on pure speech are involved. In that case, a judge ordered NBC to produce a film for his review to determine whether or not to enjoin the broadcast on the day before it was scheduled to be aired. When the film was not produced, counsel for NBC was held in contempt for failing to comply with the court's order. In *Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978), the Ninth Circuit vacated the orders to produce and the contempt order on the ground that the "order to produce the film in aid of a frivolous application for a prior restraint" was itself constitutionally insupportable and "void." (*Id.* at 907)[21] Referring to the risks of the collateral bar rule, Judge Kennedy concluded that:

> "A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt." (*Id.*)[22]

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21 The characterization of a prior restraint on publication of pure speech as being void was also made by the Court of Appeals for the Second Circuit in *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963).

22 The only case—federal or state—involving pure speech by a newspaper that has interpreted the holding in *Walker* so as to deprive a defendant newspaper of the chance to defend a contempt action on the merits is *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). For reasons set forth in the text and in Judge Wisdom's opinion for the First Circuit (PA 65 n.65), we believe that case was wrongly decided.

The concern expressed in these cases about the risks of applying the collateral bar rule to cases involving the violation of unconstitutional prior restraints on pure speech has been frequently echoed in law reviews,[23] and has led each of the seven states that have considered the question to conclude that in the narrow and rare circumstance of a prior restraint on protected speech, the collateral bar rule should not be applied.[24] These cases are typified by the ruling of the Illinois

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23 One scholar has interpreted the "transparently invalid" caveat in *Walker* in light of subsequent cases to lead to the conclusion that

> "the Court should reject the collateral bar rule for gag order cases in general. Then, when an order was invalid by the Court's standard, the press would not be put to the choice of either forfeiting its constitutional defenses or obeying the unconstitutional order at least for a time." (Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 557-58 (1977)) (footnote omitted).

Another has concluded that if a "silence order" directed at the press is not challenged in court but ignored "the merits of the order should, nevertheless be reviewed in contempt [since] [t]he interests are too basic and the problem too general to require the media to choose between abandoning a constitutional right and being punished for exercising it." Rendleman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. Rev. 127, 164 (1973). A third commentator has observed that "refusing to hear collateral attacks may, by seeming to sanction judicial lawlessness, work against the societal interest in fostering respect for judicial processes." Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 635 (1970). A more recent commentator has concluded that the "transparently invalid" language in *Walker* should be understood to cover "the case of an injunction so palpably contrary to authority that it falls under a kind of 'plain error' rule . . . [under which] existing First Amendment precedents would render 'transparently invalid' a vast range of injunctions against speech." Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 432 (1983). *See also* Comment, *Defining the "Transparently Invalid" Exception to the Collateral Bar Rule: In Re Providence Journal Co.*, 61 St. John's L. Rev. 311 (1987).

24 Even in cases involving mixed speech and action some state courts have declined to apply *Walker*, based on this Court's caveat that it does not apply to a transparently invalid order. *City of Fitchburg* v. *707 Main Corp.*, 369 Mass. 748, 343 N.E.2d 149 (1976) (injunction enforcing an ordinance that was void on its face will not support contempt); *In re Berry*, 68 Cal.2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968) (*In Bank*) (where restraining order was overbroad and vague, it was issued in excess of the court's jurisdiction and therefore contempt penalty overturned).

court in *Cooper* v. *Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977). In that case a libel plaintiff obtained an injunction preventing the defendant from editorializing about the suit. The newspaper ignored the injunction, published an editorial and later successfully appealed the constitutionality of the temporary injunction. The trial court then adjudged the newspaper in contempt. The question on appeal was whether the newspaper should have been allowed to raise the constitutional issue at the contempt hearing even though it had published in violation of the injunction. The Illinois court, citing this Court's ruling in *Maness* v. *Meyers*, held that where an injury resulting from an erroneous ruling is irreparable and involves a hallowed constitutional right, violation of the ruling may not be punishable by contempt if it is invalid. The court said:

> "It could, of course, be argued that no great loss of constitutional rights is involved in this case if we hold that the defendants should have withheld their comments pending the orderly—albeit slow—resolution of the propriety of the restraining order in the reviewing courts, or suffer the consequences even if they are upheld on review. But one person's 'orderly processes' may well be another's 'chilled speech'." (50 Ill. App. 3d at 254, 365 N.E.2d at 749)

The court distinguished *Walker* v. *City of Birmingham*, noting it "did not involve a prior restraint on pure speech with the accompanying heavy presumption against the constitutional validity of the order." (*Id.* at 257, 365 N.E.2d at 751) It concluded

> "that the defendants were not subject to the penalty of contempt for asserting their right to comment on the operation of the court system in general or in regard to the particular litigation as to which they were parties because they published in the first instance. Even though it is not presently fully settled law that every prior restraint on pure speech is constitutionally invalid (*Nebraska Press Ass'n* v. *Stuart*, 96 S. Ct. 2791), the heavy presumption against such prior restraints on pure speech must be heavily weighed and deprivation of strongly rooted first amendment rights deemed an irreparable injury, to be permitted, if at all, when the competing interests are overriding." (*Id.* at 256, 365 N.E.2d at 750-51) (footnote omitted)

The courts of six other states—each of which, it may be assumed, was deeply concerned about the necessity of general obedience to court orders—have determined, as well, not to apply the collateral bar rule in pure speech cases. In *State* v. *Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) (*en banc*), for example, the court relied on its state constitution to hold that a prior restraint on publication of tape recordings was patently invalid and therefore that a finding of contempt under the state's collateral bar rule was improper. (*Id.* at 373-74, 679 P.2d at 359) The court then demonstrated that the federal rule was actually the same. (*Id.* at 378, 679 P.2d at 361-62)[25] *See State ex rel. Superior Court* v. *Sperry*, 79 Wash. 2d 69, 78, 483 P.2d 608, 613 (*en banc*), *cert. denied*, 404 U.S. 939 (1971) (trial court's prohibiting media from covering court proceedings was void and therefore could not support contempt convictions). *See also Younger* v. *Smith*, 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225, 233 (1973) (district attorney who ignored judge's gag

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25 *State* v. *Coe*, *supra*, at 380-81, 679 P.2d at 362-63, also contains the alternative holding that even if *Walker* applied to pure speech cases, a long line of recent cases from this Court makes it clear that orders such as are at issue in this case are "transparently invalid" or have " 'only a frivolous pretense to validity' " and that therefore the doctrine of *Walker*, by its own terms, does not apply. These cases hold that a court cannot restrain publication of lawfully obtained information, even though competing fair trial or privacy issues are at stake. The applicable line of cases starts with *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), continues through *Nebraska Press Ass'n* and culminates in *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977) (*per curiam*). Taken together, these cases demonstrate that orders requiring the press to be silent as to information it lawfully gathered are at odds with the First Amendment. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

order and issued an out-of-court statement before appealing or seeking a modification could collaterally attack contempt order); *Wood* v. *Goodson*, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972) (order not to publish what transpired in open court held void and subject to collateral attack); *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966) (under Arizona constitution court could not prevent publication of what occurred in open court or hold press in contempt based on such a void order); *State* v. *Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (1937) (since judge's order prohibiting publication of a matter of public record was void, contempt charge failed); *Oliver* v. *Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (court orders infringing First Amendment rights cannot give rise to valid contempt citations) (dictum).

What we urge upon this Court is the adoption of a legal principle substantially similar to that adopted in each of the states that have considered the question. When an order restraining publication is upheld, a party violating the order must live with the adjudication of contempt. The severity of the sanction imposed may, in such circumstances, even be increased, O. Fiss, *The Civil Rights Injunction* 83 (1978). But where the prior restraint is invalidated, the conviction of criminal contempt should be reversed. Since extremely few prior restraint cases involve pure speech,[26] and pure speech cases are not associated with problems of public disorder (unlike cases involving speech mixed with conduct) such a rule is hardly likely to create any administrative burden.

Nor will such a rule of law interfere with the orderly administration of justice or lessen the dignity of the court. Although adherence to court orders is critical to the functioning of the courts, other constitutional principles must be considered as well. The willingness of this Court in *Maness* v. *Meyers* to eschew any enforcement of the collateral bar rule

26 The paucity of such cases may reflect the fact that "[t]he principles enunciated in *Near* [v. *Minnesota*], [have been] so universally accepted," *Nebraska Press Ass'n*, *supra*, 427 U.S. at 557.

that would require forfeiture of another constitutional right offers a model for the interpretation of the rule in this case. The Constitution, after all, protects freedom of speech as well as the independence of the judiciary. Where, as here, First Amendment rights involving free speech will be irreparably injured if a prior restraint is imposed, where the speech involved is pure speech, where the information was lawfully obtained, and where the prior restraint is held to be unconstitutional, a decision to test a court's order by violating it should not automatically result in the tester being transformed into a criminal.

Much of the opposition to this position offered by the petitioner and the Solicitor General focuses not on the interrelationship of our society's abhorrence of prior restraints with its need for obedience to court orders, but on matters which range from the inaccurate to the irrelevant. The petitioner, for example (although not the Solicitor General) persists in defending Judge Boyle's view that because the *Journal* had once been denied the materials it sought under the Freedom of Information Act while Patriarca's father was alive, it was somehow questionable, if not wholly reprehensible, for it to seek the materials again after his death. (Pet. Br. 33) Apart from the fact that this simply misreads the earlier decision of the Court of Appeals denying the previous application (*e.g.*, "[w]e decide only that the FBI may properly turn down this FOIA request . . . ." 602 F.2d at 1014-15), it is bottomed on the unprecedented notion that even to seek materials under the Act is, for some reason, culpable conduct.[27]

27 Several courts have indicated that the death of an individual who is the subject of an FOIA request for agency records, in addition to the passage of time, is a valid criterion for consideration by an agency in determining whether disclosure would constitute an unwarranted invasion of privacy. *See, e.g.*, *Kiraly* v. *Federal Bureau of Investigation*, 728 F.2d 273, 277-78 (6th Cir. 1984); *Diamond* v. *Federal Bureau of Investigation*, 707 F.2d 75, 77-78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984); *Powell* v. *United States Department of Justice*, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984).

Another matter raised by both the petitioner and the Solicitor General is the request by the *Journal*'s counsel, after Patriarca's counsel referred to his own scheduling problems (JA 167), for an additional day to prepare for argument on the motion. In retrospect, although such requests are commonplace in other circumstances in which hearings on significant matters are scheduled on short notice, it would surely have been preferable for the request not to have been made in this prior restraint case. That it was made, however, neither demonstrates the sufficiency of an insufficient complaint, nor the presence of the slightest shred of merit to a wholly unmeritorious position.[28] Nor, more importantly, does it suggest that the *Journal* was in the slightest trying to mislead Judge Boyle. In fact, as the uncontradicted testimony of the *Journal*'s executive editor demonstrates, the decision not to abide by Judge Boyle's order was made only after a painstaking review of what were perceived to be the alternatives open to the *Journal*—alternatives, so the *Journal* understood after consultation with counsel, that did not include as a viable option prior to the *Journal*'s publication deadline, the taking of an appeal to the Court of Appeals. (JA 125)

The failure of the *Journal* even to seek to appeal has been much commented upon by both the petitioner and the Solicitor General. Given the ruling in the First Circuit's *en banc* decision that efforts should hereafter be made to appeal from even

28 It is hardly unique for counsel, suddenly confronted with an order inconsistent with the First Amendment which requires immediate compliance of one sort or another, to make statements later sought to be used to demonstrate that First Amendment rights have been waived or are, in fact, nonexistent. *See Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904, 906 n.1 (9th Cir. 1978) (initial "stipulation" by counsel to broadcaster to comply with court order to produce unbroadcast television film for review excused by court); *In re CBS, Inc.*, 570 F. Supp. 578, 584 (E.D. La. 1983), *appeal dismissed sub. nom. United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984) (initial statement by counsel to broadcaster that client " 'was prepared to comply' " with court order to produce unbroadcast television documentary for review by court held not to constitute waiver of First Amendment right not to produce tape). Such responses should, at the least, not affect the legal analysis engaged in to test the substantive validity of positions taken.

transparently invalid orders until the newspapers' deadline, that conduct should not be expected to occur in the future. In this case, however, a confluence of factors are of note: advice was received by the *Journal* that an appeal would not lie from a temporary restraining order (JA 125, 149); the advice was probably correct as an articulation of the then existing state of the law in the First Circuit;[29] the First Circuit had, in any event, previously concluded that in cases involving pure speech, the subject of the order was free to "test[ ] the court's order by violating it and contesting the resulting contempt sanction";[30] and the First Circuit's *en banc* opinion itself concluded that it was "left without a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" (PA 49). Notwithstanding all this, the failure of the *Journal* to seek to appeal may still be viewed as unwise. But it is, at the least, wholly unfair to conclude that the decision not to appeal demonstrates any sort of willful misbehavior or, in fact, anything more than the *Journal* attempting to make a painful decision, as best it could, based on the advice it had received.

In the end, however, the core question raised in this appeal is of a different nature. It is how the values protected by this nation's resistance to and rejection of prior restraints of speech may be reconciled with the necessity of assuring order and the proper respect for judicial decrees. Affirmance of the decision of the Court of Appeals, as modified by the *en banc* ruling, would vindicate both interests.

29 *See Spencer Cos.* v. *Armonk Industries, Inc.*, 489 F.2d 704, 706 (1st Cir. 1973) (temporary restraining order not appealable); *In re Arthur Andersen & Co.*, 621 F.2d 37, 38 (1st Cir. 1980) (difficulty of establishing "indisputable right" to writ of mandamus). Nor did the First Circuit's opinion in this case contradict the *Journal*'s view as to the non-appealability of temporary restraining orders. (PA 44)

30 *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.) *cert. denied*, 449 U.S. 1021 (1980). *See* Section III, *infra*.

II.

VIOLATION OF THE DISTRICT COURT'S RESTRAINING ORDER CANNOT, IN ANY EVENT, BE THE BASIS FOR A FINDING OF CRIMINAL CONTEMPT BECAUSE THE COURT WAS WITHOUT JURISDICTION TO ENTER SUCH AN ORDER

There is a second basis, entirely distinct from that previously set forth, upon which the judgment of the Court of Appeals may be affirmed. This Court has repeatedly held that the violation of a court order cannot expose a person to criminal contempt if the court issuing the order lacked subject matter jurisdiction. *United States* v. *United Mine Workers*, *supra*, 330 U.S. at 293-94; *Walker* v. *City of Birmingham*, *supra*, 388 U.S. at 315. *See also In re Burrus*, 136 U.S. 586, 595-96 (1890); *In re Ayers*, 123 U.S. 443, 507-08 (1887). Wholly apart, then, from the issue of whether the *Journal* can be found in contempt for not complying with an unconstitutional prior restraint on its First Amendment right to publish, the precedents of this Court make clear that the finding of criminal contempt was barred by the District Court's clear lack of subject matter jurisdiction.

This is not an instance, as the Solicitor General maintains (S.G. Br. 17), where a "lawful" order within the meaning of 18 U.S.C. § 401(3) (1982) was disobeyed. Rather, because Patriarca's claim to federal question jurisdiction was so "obviously frivolous," the order entered by Judge Boyle fell outside the proscriptions of Section 401(3).

A. The District Court Clearly Lacked Subject Matter Jurisdiction *Ab Initio*

Any analysis of whether a federal district court has subject matter jurisdiction to enter a temporary restraining order to preserve the *status quo* pending a hearing on a preliminary injunction must begin with this Court's decision in *United States* v. *United Mine Workers*, *supra*. There, writing for a plurality of this Court, Chief Justice Vinson concluded that a

federal district court had the power to preserve existing conditions while it determined its own authority to grant relief, if the plaintiff seeking relief presented a substantial claim to federal jurisdiction. (*Id.* at 293) Where the plaintiff's federal jurisdictional claims were "frivolous and not substantial," Chief Justice Vinson noted, disobedience of an order preserving the *status quo* while the court was determining its authority to act is not punishable as criminal contempt. (*Id.*)

This Court's opinion in *United Mine Workers* makes clear that the determining factor is not whether an assertion of jurisdiction is easy. Chief Justice Vinson emphasized that jurisdictional questions are often "close" and may involve difficult factual questions or, as in *United Mine Workers* itself, novel legal issues. (330 U.S. 292-94 & n.57) Rather, proper analysis requires an inquiry into whether the jurisdictional question is substantial, not whether the answer to it is superficially apparent.

Between the two guideposts of a jurisdictional claim that is "frivolous" and one that is "substantial," there is often a substantial amount of room for disagreement.[31] In *Walker*, for example, this Court held that there was a substantial jurisdictional question, because of the strong state interest, when faced with enormously volatile public demonstrations, in regulating the use of streets and other public places. (388 U.S. at 315) This Court therefore upheld lower court convictions for criminal contempt. In *In re Green*, 369 U.S. 689 (1962), in contrast, this Court reversed a conviction for contempt of a state injunction because the case arguably was subject to federal,

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31 Several commentators have criticized the *United Mine Workers* decision vigorously because of the inherent difficulty and uncertainty in applying the standard. *See, e.g.*, Selig, *Regulation of Street Demonstrations by Injunction, Constitutional Limitations on the Collateral Bar Rule In Prosecutions For Contempt*, 4 Harv. C.R.-C.L. L. Rev. 135, 135 (1968); Watt, *The Divine Right of Government by Judiciary*, 14 U. Chi. L. Rev. 409 (1947); Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 633 & n.46 (1970) (and cases cited therein).

rather than state, jurisdiction. The implication of that holding, applying the *United Mine Workers*' standard, is that the jurisdictional claim in *Green* was "frivolous." Here, when Patriarca filed his Complaint, the question of jurisdiction raised no difficult factual questions nor novel legal issues. The Complaint itself cited two bases for jurisdiction, both of which neither the Solicitor General nor the petitioner in their briefs even suggest was proper. Patriarca sought injunctive relief under the FOIA and Title III of the Crime Control Act. (JA 207-08) Since neither basis for jurisdiction even raised a substantial legal question, the District Court should have concluded that it lacked power to act and, accordingly, the *Journal* should not have been adjudged guilty of criminal contempt.

Even as against the United States, let alone against the press, jurisdiction under the FOIA clearly was barred by this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). In that case, this Court unanimously held:

> "That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts 'jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.' 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. . . ."
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> * * *
>
> "We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure." (441 U.S. at 292, 294).

See also GTE Sylvania, Inc. v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 378 n.2 (1980).[32]

Just as plainly, there was no basis for the District Court's jurisdiction to entertain a suit for injunctive relief under Title III of the Crime Control Act. (18 U.S.C. §§ 2510 *et seq.* (1982 & Supp. III 1985)) That statute does not retroactively create a private right to injunctive relief against a private party which would bar disclosure of information that was wrongfully intercepted prior to the statute's enactment and disclosed to the party against whom relief is sought. *See, e.g., Zerilli* v. *Evening News Ass'n*, 628 F.2d 217, 221 (D.C. Cir. 1980).

Even more basic to the question of jurisdiction, Title III by its express terms did not create a private cause of action for injunctive relief and did not confer jurisdiction to entertain such a suit when this action was brought.[33] (18 U.S.C. § 2520) As this Court has often stated, "[j]urisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other." *Hagans* v. *Lavine*, 415 U.S. 528, 538 (1974). Since Congress had conferred no authority on the

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32 The utter lack of jurisdiction under the FOIA was urged upon the District Court from the outset of this case by the United States. (JA 184) In two briefs submitted by the Justice Department, the District Court was made acutely aware that the FOIA provided no basis for jurisdiction in this action. (JA 227-32) In its brief *amicus curiae*, before the First Circuit, the Justice Department urged that the District Court similarly had no basis for jurisdiction under Title III (Federal Defendants' *Amicus* Brief), something Judge Boyle himself acknowledged (JA 81-82).

33 In enacting Title III, it was the unequivocal intention of the Congress that "[i]njunctive relief . . . is not intended to be available." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2196. Title III was amended in 1986, well after the events at issue in this appeal, to change the law to permit a private plaintiff under the statute to maintain a suit for "such preliminary and other equitable or declaratory relief as may be appropriate." Electronic Communications Privacy Act of 1986, Pub. L. 99-508, Title I, § 103, 101 Stat. 1853. *See* S. Rep. No. 541, 99th Cong., 2d Sess. 27 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3581.

District Court to grant Patriarca injunctive relief under Title III, the court was clearly without jurisdiction.

Finally, there can be no basis for concluding that jurisdiction could be premised on plaintiff's Fourth Amendment claims. In the District Court's view (PA 17), the "real 'clash' in this action [was] the clash between the First and Fourth Amendments." It was that "clash" that the court maintained required its reflection to an extent which justified a prior restraint. The court's understanding of the Fourth Amendment in this context was plainly wrong.

Most fundamentally, the Fourth Amendment (which was not even asserted as a basis for jurisdiction by Patriarca against the *Journal* (JA 207-08)) could not possibly be the basis for jurisdiction in an action for injunctive relief against a newspaper since, by definition, a private nongovernmental party such as the *Journal* cannot violate the Fourth Amendment. It has been settled law for more than six decades that the Fourth Amendment applies only to actions by government authorities. "The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ." *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). *See also United States* v. *Calandra*, 414 U.S. 338, 354 (1974); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985). Thus, the *Journal* could not possibly infringe upon any right enjoyed by Patriarca under the Fourth Amendment—and a federal district court could not possibly have jurisdiction to entertain a suit brought on such a theory—because no action taken by the *Journal* could conceivably constitute the exercise of sovereign authority.

Notwithstanding all this authority, the District Court bottomed its jurisdiction to issue the restraining order on the supposed violation of Patriarca's Fourth Amendment rights. Apart from the fact that the *Journal* could not—and, of

course, did not—violate those rights, regardless of the *Journal*'s conduct, the District Court clearly lacked subject matter jurisdiction to entertain constitutional claims against the *Journal* absent allegations that the *Journal* was acting under color of state law. *See Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 932 n.8 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974). In *Fletcher*, the First Circuit held that *Bivens*-type[34] actions are not available against private defendants. Thus, there was no basis at all, not to say any reasonable basis, for concluding that Patriarca had even colorable Fourth Amendment claims against the *Journal*.

Despite the plain lack of jurisdiction in the District Court, petitioner urges upon this Court that Patriarca's claim to federal question jurisdiction was not frivolous because it presented "an unprecedented conflict between first amendment and fourth amendment rights." (Pet. Br. i) The Solicitor General is not so bold. He merely asserts in conclusory fashion in two footnotes that "the question of . . . jurisdiction cannot be dismissed as 'frivolous' " (S.G. Br. 16 n.10) and that cases in which insubstantial claims to federal question jurisdiction have been found are "rare." (S.G. Br. 17 n.12)

Yet this Court has never waivered in its adherence to the long-held rule "that federal jurisdiction cannot be based on a frivolous or insubstantial federal question." *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 106 S. Ct. 3229, 3237 (1986). And it remains clear that a claim to federal question jurisdiction is "obviously frivolous or plainly insubstantial . . . [when] its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hannis Distilling Co.* v. *Mayor of Baltimore*, 216 U.S. 285, 288 (1910). *Accord Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (*per curiam*); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105-06 (1933). The same is true when a claim purporting to arise under

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34 *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

the Constitution is "so attenuated and unsubstantial as to be absolutely devoid of merit." *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579 (1904).

Surely there can be no doubt that this Court's decision in *Chrysler Corp.* v. *Brown*, *supra*, squarely holding that the federal courts lack jurisdiction under the FOIA to enjoin disclosure of information, renders Patriarca's claim to jurisdiction under the FOIA "obviously frivolous" and "plainly insubstantial." Just as surely, 65 years of precedent holding that a private party such as the *Journal* is incapable of violating anyone's Fourth Amendment rights renders Patriarca's claim to jurisdiction over the *Journal* under the Fourth Amendment "absolutely devoid of merit." And just as certainly, Title III's deliberate denial of jurisdiction to entertain suits for injunctive relief can only render Patriarca's claim to jurisdiction under that statute completely untenable.

In these circumstances, the only conclusion that may be reached is that the *Journal* did not disobey a "lawful" order within the meaning of 18 U.S.C. § 401(3). There was no substantial claim to subject matter jurisdiction in the instant case that can possibly justify a conviction for criminal contempt.[35]

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35 The Circuit Courts, in a number of cases, have concluded that there can be no conviction for criminal contempt because the claim to subject matter jurisdiction was not substantial. *See, e.g.*, *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (warden's failure to comply with court order not contempt because, at pre-indictment stage of proceedings, court had no jurisdiction over warden); *Heasley* v. *United States*, 312 F.2d 641, 648-49 (8th Cir. 1963) (once tax sale had been completed, court's jurisdiction ended; order barring dispossessed owner from trespassing on property was void and criminal contempt conviction reversed); *In re Lahm Industries, Inc.*, 609 F.2d 567, 570 (1st Cir. 1979) (since bankruptcy contempt proceeding lacked proper parties, the court lacked jurisdiction, so that criminal contempt conviction was dismissed).

B. The District Court Did Not Enter The Restraining Order To Determine Its Authority To Act

Even if Patriarca had asserted a substantial claim to the jurisdiction of the District Court, there is absolutely no basis to conclude that Judge Boyle entered the restraining order to consider the question of his jurisdiction to entertain the action. From the outset, the District Court concluded that jurisdiction was present because, in its view, Patriarca's Complaint (despite its omission of any reference to Fourth Amendment claims against the *Journal*) raised questions relating to some sort of emerging conflict between the First and Fourth Amendments. (JA 174, 183) From the outset, far from considering its authority to act, the District Court proceeded to weigh the *Journal*'s First Amendment rights against what it perceived to be Patriarca's Fourth Amendment rights *vis-a-vis* the *Journal*.[36]

Unlike the District Court in *United Mine Workers*, which was faced with a novel jurisdictional question and which needed some time to consider it, the District Court in this action determined its authority to act immediately. Given these circumstances, there can be no serious contention that in issuing its restraining order the District Court invoked its jurisdiction to determine jurisdiction. Yet just such an assertion is required by *United Mine Workers* itself in order to invoke the doctrine: "*Pending a decision on a doubtful ques-*

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36 The record is clear that there was never a question in Judge Boyle's mind about his jurisdiction. After declaring at the brief chambers conference on November 13, 1985 that it appeared the *Journal*'s publication would impinge on Patriarca's Fourth Amendment rights, Judge Boyle declined to grant the parties a full hearing on November 15. Instead, he continued the restraining order because he wanted more time to consider "what I'm really interested in . . . this interaction of the Fourth and the [First] Amendment." (JA 69) Judge Boyle's decision rendered on November 19, declining to grant a preliminary injunction against the *Journal*, squarely shows that he had "balanced" the *Journal*'s First Amendment rights against Patriarca's Fourth Amendment rights, and concluded that "[i]t is likely that the Fourth Amendment prohibition would yield to the First, in the circumstances." (JA 81)

tion of jurisdiction, [a] District Court [has] power to maintain the *status quo* and punish violations as contempt." 330 U.S. at 292 (emphasis added; footnote omitted). *See United States* v. *Thompson*, 319 F.2d 665, 667-68 (2d Cir. 1963) (reversing conviction for criminal contempt where *United Mine Workers* doctrine was only basis for jurisdiction and "the [district] court was not seeking to preserve existing conditions pending a jurisdictional determination").

The Solicitor General does not argue, as he cannot, that Judge Boyle, in entering the restraining order, doubted that he had jurisdiction and had invoked the *United Mine Workers* doctrine to assert his jurisdiction to determine jurisdiction. Instead, the Solicitor General urges upon this Court a novel rule: whenever a temporary restraining order is entered to preserve the *status quo*, whatever the reason, that order is "lawful" within the meaning of 18 U.S.C. § 401(3). (S.G. Br. 14-16)

That theory is at odds with this Court's precedents, and sweeps far beyond what this Court held in *United Mine Workers*. Such a reading of the law would grant to district judges *carte blanche* to enter any prior restraint at an initial hearing, whatever the circumstances and however far the judge strayed from already clearly established law. Such a rule would undermine the very concept of the federal courts as courts of limited jurisdiction, let alone deeply rooted and long established principles of law contained in the Bill of Rights.

Here, the District Court never doubted its jurisdiction. There was no invocation of the *United Mine Workers* doctrine to consider its authority to act. The restraining order was entered without jurisdiction, and disobedience of it cannot support a conviction for criminal contempt.

III.

THE *JOURNAL* AND ITS EXECUTIVE EDITOR CANNOT BE PUNISHED FOR CRIMINAL CONTEMPT CONSISTENT WITH DUE PROCESS OF LAW

Criminal contempt proceedings have long been held to require adherence by the government to all the basic protections afforded defendants in the Constitution. *See Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2132-33 (1987). Not least of those protections is the requirement that defendants not be convicted for conduct that they did not have fair notice was criminal at the time they engaged in it. This has sometimes been phrased in terms of protecting those "who, in justified reliance upon prior decisions" engaged in one course of conduct rather than another. *NAACP* v. *Alabama*, 357 U.S. 449, 457-58 (1958). It has, as well, been said that the question is whether a defendant has been provided (by statutory language or the like) "the fair warning to which the Constitution entitles him." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964). The theme is consistent: " '[t]he dividing line between what is lawful and unlawful cannot be left to conjecture.' " *Connally* v. *General Construction Co.*, 269 U.S. 385, 393 (1926).

In this case, both the petitioner and the Solicitor General maintain that there has not been the slightest ambiguity in the law to the effect that federal court orders such as that of Judge Boyle may not be disobeyed except upon pain of contempt. As we believe we have demonstrated in Part I of this brief, that is hardly an accurate statement of law as a general matter. It is, in any event, a strikingly and provably inaccurate statement of law as set forth by the Court of Appeals for the First Circuit prior to the *Journal*'s decision to publish.

In *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.) (Coffin, C.J.), *cert. denied*, 449 U.S. 1021 (1980), the Court of Appeals considered a situation in which Arthur Andersen complied with an IRS subpoena of its workpapers

for a client after being ordered by the District Court to do so and after the District Court and the Court of Appeals had denied Andersen's motion for a stay of the court's enforcement order. (*Id.* at 722) Since Andersen had produced all the documents in question, the Court of Appeals held that the controversy was moot, rejecting Andersen's argument that the controversy was " 'capable of repetition yet evading review.' " (*Id.*) Andersen argued that the policy of opposing delays in the enforcement of IRS summonses made it unlikely that a District Court would set a compliance date that allowed time for an appeal and also that a stay pending appeal was difficult to obtain. The Court of Appeals, however, pointed out that Andersen had a third avenue to obtain appellate review: "it can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." (*Id.* at 723) The court noted that:

> "Well established doctrine regarding the appealability of interlocutory orders suggests that the burden of incurring a contempt citation is not an unreasonable one to impose on a party seeking review of a question that will otherwise become moot." (*Id.* at 724)

And in terms directly applicable to this appeal, the Court of Appeals then responded to the argument that since the mootness exception had been held present in *Nebraska Press Ass'n*, it should as well be made applicable to Arthur Andersen. The court stated:

> "It is true that in *Nebraska Press Association* the court applied the mootness exception even though *the newspaper publishers who were enjoined from reporting certain facts regarding an ongoing trial could have tested the court's order by violating it and contesting the resulting contempt sanction.* Similarly, in *First National Bank of Boston* the Court noted that the criminal penalties imposed by a Massachusetts statute prohibiting certain political expenditures by banks 'discourage challenge by violation.' Both of these cases, however, involved prior restraints on arguably protected speech. We believe the Court's unwillingness to require the parties in these cases to invite criminal sanctions in order to obtain appellate review more probably reflected the Court's traditionally disapproving view of prior restraints on speech than a broadly applicable statement on the scope of the 'capable of repetition yet evading review' exception." (623 F.2d at 724) (emphasis added)

What the Court of Appeals stated the newspaper publishers involved in the *Nebraska Press Ass'n* case could have done—to "test the court's order by violating it"—is precisely what the *Journal* did here. That being so, a criminal contempt conviction based on conduct that the Court of Appeals had previously concluded was lawful simply cannot withstand review.[37]

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37 The *Arthur Andersen* ruling was urged in this case upon the Court of Appeals (Br. of Respondents, pp. 25-26) which, given its substantive ruling, did not address it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 23, 1987